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No. 88-373

In the Supreme Court of the United States

OCTOBER TERM, 1988

VIRGINIA (GINGER) BOLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the courts below erred in dismissing her complaint as barred by the exception to the Federal Tort Claims Act (FTCA) (28 U.S.C. 1346(b) and 2671 *et seq.*) that preserves the United States' sovereign immunity against "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty * * *" (28 U.S.C. 2680(c)).

1. Petitioner's lawsuit stems from the actions of Maurice Hildebrand, an undercover operative for the Internal Revenue Service (IRS). Petitioner alleges that Hildebrand wrongfully converted musical recordings of her gospel singing for use in an IRS "sting" operation. According to petitioner, Hilde-

brand obtained the musical tapes from her by offering to seek a commercial market for her singing talents. The IRS investigative team, including James Climer, used these tapes as bait for persons suspected of participating in illegal tax shelters. Targets of the IRS investigation were afforded the opportunity to invest in musical recordings, including those made by petitioner. Hildebrand also mailed to the investigative targets copies of petitioner's portfolio that included recommendation letters supporting petitioner from several prominent people in Oklahoma. IRS officials have since apologized to petitioner. Pet. 4-6.

Petitioner filed an administrative tort claim, contending that the IRS's use of her name and her music constituted an unlawful conversion of her property. On January 2, 1986, after her administrative claim was denied, petitioner filed this lawsuit under the FTCA seeking $8,000,000 in damages for loss of her musical property, injury to her personal and professional reputation, and emotional harm.

2. After a hearing on March 27, 1986, the district court dismissed (Pet. App. A1-A2) petitioner's action, ruling that it was barred by the exception to the FTCA that preserves the United States' sovereign immunity against "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty * * *" (28 U.S.C. 2680(c)). The court found (Pet. App. A1) that the investigation into abusive tax shelters was "a revenue-raising activity in respect to the assessment or collection of taxes." It then held (*ibid.*, citing *Capozzoli* v. *Tracey*, 663 F.2d 654, 658 (5th Cir. 1981)) the language of Section 2680(c) to be sufficiently broad "to encompass any activities of an IRS agent even remotely related to his or her official duties." Accordingly, the court

concluded (Pet. App. A2) that petitioner's claim based on activities related to the IRS investigation was not actionable under the FTCA. It denied (Docketing Statement (10th Cir.), Exh. A) petitioner's motion to vacate the dismissal. The court of appeals affirmed (Pet. App. A3) in a three-sentence opinion, concluding that the district court correctly dismissed petitioner's action for lack of subject matter jurisdiction. The court stated (*ibid.*) simply that "[t]he United States has not waived its sovereign immunity in regard to claims arising in respect to the assessment or the collection of any tax."

3. The decision of the court of appeals is correct and does not conflict with any decision of any other court of appeals. The United States may only be held liable for torts committed by its employees when it has clearly relinquished its sovereign immunity by statute. *Kosak* v. *United States*, 465 U.S. 848, 851 (1984) (citing *Dalehite* v. *United States*, 346 U.S. 15, 31 (1953)). As both the district court (Pet. App. A1) and the court of appeals (*id.* at A3) noted, a statutory exception to the FTCA expressly *preserves* the sovereign immunity of the United States from "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty" (28 U.S.C. 2680(c)). Moreover, this Court has stressed (*Kosak*, 465 U.S. at 854) that the language of Section 2680 (c) is to be read expansively to bar any claims "arising out of" the specified activity. Although *Kosak* concerned Section 2680(c)'s parallel provision concerning "the detention of any goods or merchandise by any officer of customs," the Court's analysis (*id.* at 853-855) of the statute's plain meaning applies equally to bar any claims arising "out of" tax collecting activities. See, *e.g.*, *Murray* v. *United States*, 686

F.2d 1320, 1324 (8th Cir. 1982) (no FTCA suit for wrongful denial of mortgagee's redemption rights by IRS), cert. denied, 459 U.S. 1147 (1983); *Morris* v. *United States*, 521 F.2d 872 (9th Cir. 1975) (no FTCA suit for harassment, intimidation, damage to taxpayer's business caused by agent); *United States* v. *Worley*, 213 F.2d 509 (6th Cir. 1954) (no FTCA suit for wrongful conversion of property by IRS), cert. denied, 348 U.S. 918 (1955); *Broadway Open Air Theatre* v. *United States*, 208 F.2d 257 (4th Cir. 1953) (same). Here petitioner's harm clearly resulted from Hildebrand's and Climer's efforts to assess and collect taxes from the targets of the IRS investigations. Accordingly, no action against the United States is available to redress petitioner's alleged injuries.[1]

Petitioner seeks to escape the statutory bar to her lawsuit by asserting (Pet. 9-11) that the IRS agents' conversion of her musical recordings was somehow separate from the IRS's efforts to assess or collect taxes. Petitioner contends (*id.* at 10) that to find a link between the taking of her tapes and the IRS "sting" operation would be to ignore "the elements of time and space." The statute, however, requires

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[1] Petitioner's reference to *Rutherford* v. *United States*, 702 F.2d 580 (5th Cir. 1983), is not apposite. *Rutherford* concerned an action under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), against an IRS agent, not a tort claim under the FTCA against the United States. Petitioner also cites *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978), and *Cruikshank* v. *United States*, 431 F. Supp. 1355 (D. Haw. 1977), for their discussion concerning the scope of authority limiting the discretionary function exception to the FTCA (28 U.S.C. 2680(a)); that discussion is not relevant in construing Section 2680(c)'s clear reference to tax collecting and assessing activities.

no precise spatial or temporal link between the challenged IRS conduct and the IRS's tax collecting activities. Insofar as petitioner is correct that IRS employees "converted her name and property with the intent to use it in their 'sting' operation" (Pet. 11), the relation of the conversion and the tax collecting effort is evident. The situation is no different from that where an IRS agent mistakenly seizes funds and brings them home before depositing them with the Treasury; the fact that the money traveled a circuitous route would hardly create federal liability for the wrongful seizure. Petitioner does not cite any authority to the contrary.

Nor can petitioner support her claim that the sovereign immunity of the United States is somehow removed because of the fact that she herself was never a target of the IRS investigation. The plain language of Section 2680(c) bars "[*a*]*ny* claim arising in respect of" tax collection. 28 U.S.C. 2680(c) (emphasis added). Accordingly, federal courts have uniformly held Section 2680(c) applicable to third-party claims. *Interfirst Bank Dallas, N.A.* v. *United States*, 769 F.2d 299, 307-308 (5th Cir. 1985), cert. denied, 475 U.S. 1081 (1986); *Murray*, 686 F.2d at 1324; *Worley*, 213 F.2d at 512; *Broadway Open Air Theatre*, 208 F.2d at 258. These decisions correctly adhere to this Court's settled principle (*Dalehite*, 346 U.S. at 30) that "no action lies against the United States unless the legislature has authorized it." Moreover, a decision to exempt third parties from Section 2680(c) would contravene the statute's obvious purpose of aiding tax collection because it would impair the IRS's ability to recover taxes from persons whose property was in the possession of others or otherwise encumbered. See, *e.g.*, *Interfirst Bank*, 769 F.2d at

308 (IRS tax collection effort immune from suit by bank holding security interest in taxpayer's accounts receivable); *Murray*, 686 F.2d at 1324 (similar, where suit by individual claiming to be mortgagee of taxpayer). In fact, 26 U.S.C. (& Supp. IV) 7326's protection for victims of wrongful levies would be rendered wholly superfluous (*Interfirst Bank*, 769 F.2d at 398 n.14) if suits under the FTCA were already available to third parties whose property was wrongfully seized. Accordingly, a bar on suits by third parties whose property is taken in connection with IRS tax collection efforts is safely "within the words and reason of [Section 2680(c)'s] exception" to the FTCA. See *Kosak*, 465 U.S. at 853-854 n.9 (quoting *Dalehite*, 346 U.S. at 31).

Finally, petitioner contends (Pet. 7-11) that the court of appeals' decision conflicts with the Fifth Circuit's decision in *Capozzoli* v. *Tracey*, 663 F.2d 654 (1981). In fact, the court of appeals' decision is a straightforward application of the framework *Capozzoli* established. In *Capozzoli*, the Fifth Circuit found the United States *immune* from a suit based on accusations that an IRS agent had invaded plaintiffs' privacy when he mistakenly photographed their home during the course of investigating a casualty loss deduction applicable only to plaintiffs' adjacent, undeveloped tract of land. The court concluded (663 F.2d at 657-658) that Section 2680(c) would bar the suit even if the IRS agent had no authority to take the allegedly invasive photographs. Only "[w]here an IRS employee commits a tort wholly unrelated to his or her official duties of assessing or collecting taxes" (663 F.2d at 658), would the sovereign immunity retained under Section 2680(c) not apply. In this case, Hildebrand's actions were arguably even

more closely related to his official duties than were the actions of the *Capozzoli* agent. Hildebrand allegedly took petitioner's musical tape and used it in a tax "sting" operation; the *Capozzoli* agent mistakenly took photographs that had no use to the IRS. The courts below thus stayed well within *Capozzoli*'s holding that Section 2680(c) bars any FTCA suit that is based on "any activities of an IRS agent even remotely related to his or her official duties" (663 F.2d at 658).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[2] The dicta in *Capozzoli* acknowledging the theoretical possibility that an agent could commit a tort that would be sufficiently unrelated to his official duties for purposes of Section 2680(c) but still within the scope of his employment for the purpose of establishing the government's vicarious liability is irrelevant to this case. The courts below did not deny that theoretical possibility; they simply did not find it present on the facts of this case.

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